Supreme Court, U.S.
FILED

941105 DEC 12 1994

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF TEXAS,
Appellant,

VS.

UNITED STATES,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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December 12, 1994 — Attorneys for State of Texas

38 pp

QUESTIONS PRESENTED

1. Does a three-judge United States District Court for the District of Columbia sitting in a declaratory judgment action under section 5 of the Voting Rights Act have subject matter jurisdiction to grant injunctive relief of the type assigned by section 5, as explained in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), to three-judge federal district courts in the states covered by section 5's preclearance requirements?

2. If such remedial jurisdiction resides in the "declaratory judgment" court, is equitable balancing required in its exercise?

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court is unreported. It is reproduced in the appendix at the end of this jurisdictional statement (J.S. App.) at 1a-3a.

JURISDICTION

The memorandum and order of the district court, granting injunctive relief, was entered on September 27, 1994. J.S. App. 1a-3a. The state's notice of appeal was filed on October 13, 1994. J.S. App. 4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTORY PROVISIONS INVOLVED

The relevant federal statutory provision is section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, reproduced in the part relevant to Texas at J.S. App. 16a. The state statutes creating new judgeships are reproduced in relevant part at J.S. App. 17a-18a.

STATEMENT OF THE CASE

This case arises from the filing of the state's action to obtain judicial preclearance for certain new judgeships created by the Texas legislature. Through that action, the state invoked the jurisdiction given by section 5 to the United States District Court for the District of Columbia to issue "declaratory judgment[s]." With the suit pending and the preclearance issue unresolved, the United States -- defendant in the declaratory judgment action -- sought and obtained emergency injunctive relief, keeping six of the judgeships off the state's 1994 general election ballot. The state appeals from the injunction.

1. In 1988, the countywide system for electing Texas district judges in nine urban counties came under voting rights attack in a suit filed in the United States District Court for the Western District of Texas in a suit simply termed, for purposes of this statement, the *LULAC* suit. The *LULAC* district court rejected the plaintiffs' constitutional equal protection challenge, determining that the election system is not instituted with the specific intent to dilute, minimize, or cancel the voting strength of black or Hispanic voters. This aspect of the *LULAC* ruling went unappealed.

The *LULAC* district court ruled, however, that the countywide judicial election system in the nine targeted counties did violate section 2 of the Voting Rights Act. The appeal of this decision made its way through panel and en banc opinions by the Fifth Circuit, to this Court on the basic question of whether section 2 applied to the election of district judges, *see Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), and back down to the Fifth Circuit. Once back down there, the case again went through panel and en banc decisions.

The case culminated in August, 1993, with the Fifth Circuit's ruling that Texas's judicial selection system in the nine counties did *not* violate section 2; this Court denied certiorari in January of this year. *League of United Latin American Citizens Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 878 (1994).

2. The 1987 and 1993 Texas legislatures added courts to the preexisting system for district and statutory county courts in four Texas counties, and the state had submitted them in mid-1993 to the Department of Justice (DOJ) for administrative preclearance.[1] Later in 1994, after the state's en banc Fifth Circuit victory in *LULAC* and this Court's refusal of discretionary review, DOJ began to lodge section 5 objections to the new judgeships. After denials of administrative preclearance for three judgeships but before the one for Tarrant County eventuated, the state decided to repair to the D.C. court to seek judicial preclearance, where it filed its declaratory judgment action on July 14, 1994, J.S. App. 6a-15a.

3. By the time of the preliminary injunction activities giving rise to this appeal, the state's declaratory judgment action concerned seven new state courts[2] in four counties: (i) a new statutory county court in Harris County, which would bring those courts to 23 in that county; (ii) a new statutory county court in Fort Bend County, making 3 such courts there; (iii) a new district court in Midland County, making 4 such courts there; and (iv) four new statutory county courts in Tarrant County, making 15 such courts there.

The United States had conceded that the new judgeships were not retrogressive under the standard of *Beer v. United States*, 425 U.S.

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1 The Texas Secretary of State's office, as the section 5 submitting authority for the state, discovered in preparing the submission of the new 1993 judgeships that it had failed to submit four of the 1987 judgeships, so it submitted them, too.

2 One district and six statutory county courts were at issue. Simplifying, district courts are the basic trial courts of general jurisdiction in Texas; statutory county courts are the trial courts handling smaller civil and criminal cases and probate matters. The election system for the two different types of trial courts is identical.

130, 141 (1976). This concession left only the question of purposeful discrimination in the declaratory judgment case.

4. Two months after the state's declaratory judgment action was filed, as the deadline approached for printing the state's general election ballots, the United States came to the D.C. court and asked for emergency injunctive relief. It sought an injunction to prohibit the state from including any of the seven judgeships on the ballot and to force it to try to dissolve an earlier 1994 injunction from a three-judge federal district court -- in *Hernandez v. Texas*, MO-94-CA-110 (W.D. Tex.) -- which permitted the Midland district court judgeship to appear on the ballot (while precluding the state from filling it until preclearance).

5. In response to the government's request for emergency injunctive relief, the state continued to agree that the new judgeship positions could not actually be filled until they had been precleared but resisted the effort to prevent them from even appearing on the general election ballot. Among other things, the state argued that equitable balancing, employing the typical four-part test,[3] was required. In connection with this argument, the state urged the D.C. court to work into the balancing formula the facts that: (i) it had been conclusively determined by the *LULAC* district court that the countywide selection system was not intentionally discriminatory towards minority voters; (ii) DOJ was collaterally estopped from objecting to the Tarrant County judgeships because it already had administratively precleared the same kind of judgeship in the same county created by the same legislature at the same time; and (iii) there was no identifiable harm from placing the judgeships on the ballot in light of the state's express agreement that the judicial slots could not be filled until preclearance had been obtained.

6. The D.C. court granted the United States' preliminary injunction in part and denied it in part. While the court permitted the

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[3] The elements of the four-part test are likelihood of success on the merits, irreparable harm, balance of competing harms between the two sides, and the public interest. *See, e.g., O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 428 (D.C. Cir. 1992).

Midland district judgeship to remain on the ballot in deference to the *Hernandez* judgment, it enjoined the state from having the other six judgeships appear on the general election ballot. J.S. App. 3a. In doing so, the court refused the state's entreaty to equitably weigh the law and the facts.[4] Instead, terming *Clark v. Roemer*, 500 U.S. 646 (1991), "dispositive," the court concluded that it is "mandatory" that positions cannot be on the ballot if they have not been precleared. J.S. App. 1a-2a. Then, refusing to do any equitable balancing, it ordered the six judgeships not to be printed on the ballots.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Incrementally over time and through an accretion of precedent, the D.C. federal district court has strayed from its section 5 jurisdiction. The court's issuance of preliminary injunctive relief in this case against the state in the midst of an action by the state to obtain a declaratory judgment pursuant to section 5's dictates violates the jurisdictional lines laid down by section 5 and long-noted by this Court. The equitable jurisdiction which the court exercised falls squarely within the equitable jurisdiction allocated to a different court.

From its first interpretations of the Voting Rights Act, this Court has observed a bifurcated approach to implementation of section 5's mandates: section 5 declaratory judgment actions are the province of three-judge federal district courts in the District of Columbia, but section 5 injunctive enforcement actions are the province of three-judge federal district courts in the covered states. This jurisdictional division of labor was first announced in the seminal ruling of *Allen v. State Board of Elections*, 393 U.S. 544, 557-60 (1969), reconfirmed in *Perkins v. Matthews*, 400 U.S. 379, 383-85 (1971), and has continued unquestioned and unreconstructed to the present day. *See, e.g., City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983) (explaining limited

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[4] The transcript of argument on the preliminary injunction application, occurring on the same day the appealed order issued, most directly reveals the court's approach to this point. There, Chief Judge Edwards repeatedly emphasizes the view that equitable balancing is inappropriate in a section 5 injunction setting.

jurisdiction of forum state federal district courts in section 5 enforcement).

Section 5's explicit language confirms this Court's longstanding allocation of remedial jurisdiction under section 5. It specifically limits the United States District Court for the District of Columbia to "declaratory judgment" actions in section 5 cases.

The reach of the district court's statutorily limited remedial jurisdiction is an important issue for the administration and enforcement of this important provision of federal voting rights law. It is especially important to the states and political subdivisions covered by section 5. Section 5 already imposes understandable but nonetheless substantial administrative hurdles to those governments in adjusting their election laws to keep pace with modern demands.

The circumstances giving rise to this case highlight those hurdles. To do something as seemingly simple as adding a single judgeship in a county to keep pace with rapidly accelerating docket demands in its urban areas, the State of Texas has to endure the delays attendant to obtaining either administrative or judicial preclearance. Administrative preclearance was denied in this instance -- in what the state has argued below is an improper rearguard action against the outcome of the Fifth Circuit's *LULAC* decision[5] -- forcing the state to turn to the D.C. court if it wants to add any new judgeships. Once there, not only is the state pressed to undertake the massive effort required to put together its declaratory judgment case for a trek to the District of Columbia for a preclearance trial; it also has been forced to come to the District of Columbia to fend off the federal defendant's emergency effort on the eve of the state's ballots being printed. The state faced this

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[5] The effort continues DOJ's disturbing use of its administrative preclearance powers to evade Fifth Circuit law even within the geographic confines of the Fifth Circuit itself in the context of state judicial selection. Late in 1990, during an earlier phase of the *LULAC* case, DOJ informed a three-judge section 5 enforcement court that "it does not consider itself bound by the *LULAC* decision, even as to electoral changes in the three states encompassing the Fifth Circuit." *Mexican American Bar Association of Texas v. Texas*, 755 F.Supp. 735, 741 (W.D. Tex. 1990), *appeal dism'd*, 500 U.S. 940 (1991).

compulsion in the absence of a clear jurisdictional grant and despite the fact that, as the *Hernandez* case on the Midland judgeship demonstrates, federal district court forums are readily available in the state to address these emergency remedial issues in a more timely fashion than the courts in D.C. and in a more accessible venue.

More fundamentally, the observance of congressional jurisdictional constraints always presents an important question lying at the heart of federal courts' institutional authority. Whether these jurisdictional constraints are being observed in the administration of a federal statute such as section 5, which already stretches federalism to its limits, is especially important in maintaining both the federal legislative and judicial balance and the state and federal balance.

A quite limited and indirect exercise of equitable powers by the D.C. federal district court in a section 5 context, in which an incentive to devise a certain kind of electoral plan was established by the court, was narrowly accepted by this Court in *City of Port Arthur v. United States*, 459 U.S. 159 167 (1982). Unlike here, however, this jurisdictional exercise did not touch any other court's designated jurisdictional domain. Even narrow approval of that limited exercise received pointed criticism. *Id.* at 173 (Powell, J., dissenting, joined by Rehnquist and O'Connor, JJ.).

The district court's extension of its equitable reach in cases such as the one here presents even more troubling concerns about how far the declaratory judgment jurisdiction can be expanded to regulate through injunctive remedies other aspects of state election laws. Under the district court's approach, what Congress expressly conceived as a court of tightly restricted jurisdiction -- a specialized forum -- threatens to break free of its jurisdictional constraints and become a free ranging voting rights forum where legal battles fought elsewhere by the state must be refought. In the meantime, entire sectors of state government -- such as the state judiciary -- can be brought to a standstill by the distant D.C. forum's equitable long arm.

States and other local governments need a clear delineation of the ways in which their exercise of the section 5 right to seek judicial

preclearance, independent of the administrative preclearance option, is to be chilled by exposure of their election machinery to far-reaching equitable inquiries launched from the District of Columbia. This case offers the Court an opportunity to provide important direction on the expansiveness of the powers under section 5 of the United States District Court for the District of Columbia.

> I. **Whether a D.C. federal district court whose jurisdiction has been invoked under section 5's grant of authority to issue declaratory judgments has jurisdiction to issue injunctive relief available in a federal district court of the forum state?**

In assessing the D.C. court's jurisdiction to issue injunctive relief, this Court operates from a presumption that such jurisdiction is absent. This approach stems from the principle that federal courts are courts of limited jurisdiction, having only the power authorized by the Constitution and Congress. *Kokkonen v. Guardian Life Insurance Co.*, 114 S.Ct. 1673, 1675 (1994). Subject matter jurisdiction cannot be conferred by the parties' consent or conduct, and not raising it does not waive it. *See, e.g., Bender v. Williamsport Area School District*, 475 U.S. 534, 539-41 (1986).

"There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Congress's Article III, section 1, power to "ordain and establish" inferior federal courts includes the power to confine equitable jurisdiction to specific ones. *Id; see also Bowles v. Willingham*, 321 U.S. 503, 511 (1944).

This Court relied on *Lockerty* and its jurisdictional principles in its original decision upholding the constitutionality of section 5 of the Voting Rights Act and its designation of the D.C. federal court as the jurisdictional forum court for section 5 declaratory judgment actions. *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966). The identical principles apply here to place the injunctive relief granted by the court below outside its jurisdictional reach.

The court below did not attempt to justify its exercise of jurisdiction. Its ready assumption of such jurisdiction springs from the analysis in one of its earlier cases of similar setting, *South Carolina v. United States*, 589 F.Supp. 757 (D.D.C. 1984) (3-judge court). There, to justify its issuance of an injunction, the court turned to 42 U.S.C. § 1973*l*(b) as the source of its injunctive jurisdiction. *Id.* at 759.

Resting D.C. district court injunctive jurisdiction on § 1973*l*(b) is a doomed proposition. While the provision does give the D.C. court injunctive jurisdiction, it is only of a specified sort, completely different than the type exercised in this case. Section 1973*l*(b) concerns only injunctions against Voting Rights Act provisions and federal officials acting pursuant to them. It forces states seeking injunctions against enforcement of the Voting Rights Act to come to the District of Columbia. By its own explicit terms, § 1973*l*(b) has nothing to do with injunctions *against* state officials and purporting to rest on the validity of section 5.

This Court said as much in the *Allen* decision. There, the Court specifically differentiated injunctions under § 1973*l*(b) from injunctions to enforce section 5. 393 U.S. at 558. Thus, there is a fundamental flaw in the D.C. court's underlying basis for the assertion of jurisdiction to issue injunctions such as the one at issue on this appeal.

In its original explanation of the basis for the division of section 5 jurisdiction into D.C. declaratory judgment actions and forum state injunctive enforcement actions, the Court explained:

> Indeed, the specific grant of jurisdiction to the district courts in § 12(f) [*i.e.*, 42 U.S.C. § 1973j(d)] indicates Congress intended to treat "coverage" questions differently from "substantive discrimination" questions.

Allen v. State Board of Elections, 393 U.S. at 559.[6] The continuing exercise of improper jurisdiction by the United States District Court for

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[6] Section 1973j(d) authorizes the United States to institute "an action" for preventive relief, to keep (for example) section 5 from being violated. *Allen* makes clear that such

the District of Columbia in section 5 declaratory judgment actions, of which this case is but a recent example, ignores *Allen's* mandate and explicit congressional limitations.

Injunctive relief is "strong medicine." *Steffel v. Thompson*, 415 U.S. 452, 466 (1974). Congress can, and has, treated declaratory relief as an alternative remedial device, a milder palliative. *Cf. id.* (addressing Declaratory Judgment Act). "[D]ifferent considerations" attend the two forms of relief. *Id.* at 469. Against this backdrop, conferring jurisdiction to grant one type of relief cannot be treated as conferring jurisdiction to grant the other.

In *Clark v. Roemer*, the Court observed the superior position of the local district courts to determine appropriate relief in settings identical to the one giving rise to this appeal. 500 U.S. at 659-60. What the lower court did here undermines precisely what *Clark* praises. The Court should note jurisdiction and resolve this important jurisdictional question.

II. Whether, assuming injunctive jurisdiction exists, equitable balancing is required in its exercise?

The state's entreaties to the lower court to perform the traditional equitable balancing in assessing whether to enjoin the state to exclude the judgeships from the ballot had a strong basis in the realities of this case. The state well understood that preclearance was necessary before the judgeships could actually be filled and committed itself to that proposition. At the same time, though, the judges who won the 1994 general elections would not begin their terms until January 1, 1995. *See, e.g.*, J.S. App. 17a (Harris and Fort Bend judgeships).

In the state's view, the likelihood of being able to meet that timeline for filling the judgeships (were the elections to have occurred) was high in light of circumstances surrounding its judicial selection system for trial judges in urban counties. In 1987, DOJ had precleared a

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actions are to be brought in the forum state, not the District of Columbia. The United States ignored this directive in this case and proceeded in the District of Columbia.

new Tarrant County judgeship identical in type and time of creation to the four it now unaccountably was arguing were created for the purpose of discriminating against minority voters. The federal district court in *LULAC* had found that the state did not create or maintain the countywide election system for district judges for the purpose of discriminating against minority voters, and the minority plaintiffs had not even appealed that ruling. The Fifth Circuit in *LULAC* had just found no vote dilution in the countywide election system in three of the four counties where judgeships were being added.

All these facts, the state argued, were highly relevant to such elements of the equitable balancing formula as whether the United States was likely to succeed on the merits of the declaratory judgment action. The Court has given indirect indication that such considerations were perfectly appropriate -- if not required -- in section 5 enforcement actions. *See Clark v. Roemer*, 500 U.S. at 660 (directing the lower court to implement section 5's mandate in an "equitable and practicable manner"). Justice Kennedy, in his capacity as a Circuit Justice, had recently employed equitable balancing principles in deciding whether to enjoin an unprecleared change. *Lucas v. Townsend*, 486 U.S. 1301 (1988) (J. Kennedy, Circuit Justice).

These legal threads indicate that the four-part balancing test should have applied to the United States' injunction application. Additionally, the lower court's exercise of injunctive jurisdiction was at best premised on an effort to aid its exercise of jurisdiction, not on section 5's conferral of injunctive powers. That premise carries with it only the traditional equitable principles, including balancing of the equities, not the rigidities of section 5 enforcement lying with forum state courts under this Court's precedents.[7]

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[7] An important factor which the lower court would have to take into account were it to employ equitable balancing principles is precisely what constitutes "implementation" of an unprecleared statute creating a new judgeship but changing nothing else in the selection system. Which constitutes implementation of a new judgeship, filling the position or conducting the election? Section 5's language offers no direct assistance on this point. It states that, until preclearance, "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure[.]"

Even were the Court to determine that D.C. district courts have injunctive jurisdiction of the sort exercised here, the manner in which they must approach the exercise of that jurisdiction remains a question of importance. The lower courts need guidance on whether rigid formalism or equitable balancing is required.

III. Mootness does not preclude the Court's exercise of jurisdiction in this case, because it presents an issue capable of repetition yet evading review.

The lower court's injunction functioned as a permanent one. It issued at the last minute, just as the general election ballots were being sent to the printers. Once issued, it foreclosed any turning back. Elections for the six affected courts in the three affected counties did not occur.

The context in which the injunction issued in this case is typical of election lawsuits in general and section 5 lawsuits in particular. They take place in an emergency setting, in the last minute before some ineluctable election deadline passes.

The Court has made clear that the mootness doctrine does not preclude consideration of such cases. They provide a paradigm for application of the mootness-avoiding doctrine of capable of repetition yet evading review. *See, e.g., Moore v. Ogilvie*, 394 U.S. 814 (1969) (applying doctrine in election context).

With explosive urban growth and burgeoning court dockets, Texas is going to be continually adding judgeships and just as continually faced with preclearance hurdles, including short deadlines before implementation (from the United States' perspective) begins. Guidance on the issues presented in this case will continue to be needed in light of what apparently is an unrelenting DOJ war on the Texas judicial selection system.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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December 12, 1994

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

File Stamped September 27, 1994

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 94-1529
	§	(HTE (USCA), JGP, TPJ)
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

Defendant United States of America has moved this Court to issue a preliminary injunction granting three forms of equitable relief. The United States requests this Court to enjoin the certification of candidates for the Texas general elections to be held on November 8th, 1994, for the judgeships of the County Court at Law No. 3 for Fort Bend County, the County Criminal Court at Law No. 15 for Harris County, County Criminal Courts Nos. 7-10 for Tarrant County, and the 385th District Court for Midland County; to order the withdrawal of any such certification already made; and to order Texas to seek dissolution of the final judgment entered on August 22, 1994, in Hernandez v. Texas, MO-94-CA-110 (W.D. Tex.), which judgement permits Texas to conduct the judicial election for the 385th District Court for Midland County, Texas, but prohibits the final swearing in of the successful candidate.

This memorandum must necessarily be brief because of the time constraints created by Texas' need to print ballots for the forthcoming general elections. As to all the judicial elections that are the subject of this motion for preliminary injunction, the Supreme Court decision of Clark v. Roemer, 500 U.S. 646 (1991) (per curium) is dispositive: Texas proposes to conduct those judicial elections without necessary preclearance under § 5 of the Voting

Rights Act of 1965, as amended, 42 U.S.C. 1973c (hereinafter §5); therefore, an injunction to stop the elections is mandatory. Clark, 500 U.S. at 654 ("Section 5's prohibition against implementation of unprecleared changes require[s] the District Court to enjoin the election.").

A unique problem is posed, however, with respect to the election planned for the 385th District Court of Midland County. With respect to that election, a properly-constituted three-judge District Court of equal stature with this Court, acting within its lawful jurisdiction, has entered a final judgement in a private action under § 5, which judgment permits Texas to conduct that election, and prohibits only the final swearing in of the winning candidate before preclearance. See Final Judgment in Hernandez v. Texas, MO-94-CA-110 (W.D. Tex.) (Aug. 22, 1994). Obviously, a serious question of comity is raised by these circumstances. The Supreme Court did not address the question of parallel § 5 proceedings in Clark v. Roemer, so that decision is not dispositive of the issues posed when two District Courts with proper jurisdiction over cases involving the same state or local government entities disagree over the appropriate injunctive relief necessary to enforce § 5's prohibition against the implementation of unprecleared elections. Moreover, counsel for both parties believe that different courts presiding over private and government enforcement actions enjoy coterminous authority under § 5, such that the government's injunctive request does not override the judgment in the Hernandez case. Neither side has produced authority which speaks to the issue of parallel § 5 proceedings, when both courts have coterminous authority, and when the same state or local body is effected. It appears to the Court that it would be improper to issue an order which clearly conflicts with that of a coequal Court, absent clear authority granting that power. In this situation comity requires this Court to stay its hand.

The Court also holds that it would be a misuse of this Court's equitable power to order Texas to seek a dissolution of the Hernandez judgment. As a party to the Hernandez proceedings, Texas is entitled to rely on the judgment of that coequal District Court, without intermeddling by this Court. The United States must apply to the Federal District Court in Texas to modify the Hernandez

judgment, if the United States believes the judgment should be reconsidered in the light of Clark v. Roemer.

Plaintiff State of Texas requested this Court to make clear the status of the judges currently sitting in County Criminal Courts Nos. 7-10 for Tarrant County, Texas. These judges are serving pursuant to elections conducted without § 5 preclearance, but to which the United States Department of Justice made no timely objection under § 5. This issue was not squarely before this Court, but it is the understanding of this Court that these sitting judges will remain in office pending the timely outcome of the underlying litigation, or until properly replaced pursuant to the law of Texas and of the United States.

For the foregoing reasons, therefore, it is, this *27th* day of September, 1994,

ORDERED, that defendant's motion for a preliminary injunction enjoining the certification of candidates for the Texas general election scheduled for November 8th, 1994, and ordering withdrawal of any such certification already made, is granted with respect to the County Court at Law No. 3 for Fort Bend County, the County Criminal Court at Law No. 15 for Harris County, and County Criminal Courts Nos. 7-10 for Tarrant County, and denied with respect to the 385th District Court for Midland County; and it is

FURTHER ORDERED, that defendant's motion for an order directing Texas to seek dissolution of the final judgment entered on August 22, 1994, in the case of Hernandez v. Texas, MO-94-CA-110 (W.D. Tex.) is denied; and it is

FURTHER ORDERED, that the temporary restraining order entered by this Court on September 15th, 1994, is dissolved.

/s/
Harry T. Edwards
Chief U.S. Circuit Judge

/s/
John Garrett Penn
Chief U.S. District Judge

/s/
Thomas Penfield Jackson
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed October 13, 1994
Entered October 14, 1994

STATE OF TEXAS,	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 94-1529
	§	(HTE {USCA}, TPJ, JGP)
UNITED STATES OF AMERICA,	§	
Defendant.	§	

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 18.1 of the Rules of the Supreme Court of the United States, notice is hereby given that the State of Texas appeals to the Supreme Court of the United States from the Memorandum Opinion and Order of September 27, 1994, granting at page 4 a preliminary injunction with respect to the County Court at Law No. 3 for Fort Bend County, the County Criminal Court at Law No. 15 for Harris County, and County Criminal Courts Nos. 7-10 for Tarrant County.

This appeal is taken pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

Respectfully submitted,

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ATTORNEYS FOR STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that on the 7th day of October, 1994, I forwarded a copy of the foregoing document by certified mail, return receipt requested, to: Robert A. Kengle, Voting Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66128, Washington, D.C. 20035-6128; José Garza, Texas Rural Legal Aid, 405 N. St. Mary's St., Suite 400, San Antonio, Texas 78205; Jacqueline A. Berrien, NAACP LDF, 99 Hudson St., Suite 1600, New York, New York 10013; and Steve Bickerstaff, Bickerstaff, Heath & Smiley, 98 San Jacinto Blvd., Suite 1800, Austin, Texas 78701-4039.

/s/
Renea Hicks

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	§	
209 W. 14th St.	§	
14th & Lavaca, 8th Floor	§	
Price Daniel Bldg.	§	
Austin, Texas 78701	§	
Plaintiff,	§	Case Number 1:94CV01529
	§	Judge: Thomas Penfield Jackson
v.	§	Deck Type: Three Judge Court
	§	Date Stamp: 07/14/94
UNITED STATES OF AMERICA,	§	
Defendant.	§	

COMPLAINT

The State of Texas files this action for a declaratory judgment with respect to: Texas statutes enacted by the 73rd Texas Legislature in 1993 which added additional courts to three Texas counties and modified an existing court in one Texas county; and a Texas statute enacted by the 70th Texas Legislature in 1987 which added additional courts to the same Texas county which received the 1993 court modification. Each of these additional judgeships is subject to the preexisting electoral method of judicial selection. The action is based on the following grounds:

JURISDICTION AND PARTIES

1. This action arises under section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, which (when applicable) prevents implementation of state electoral law changes until the preclearance precondition is satisfied administratively or judicially.

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1973c. Texas requests that a three-judge Court be convened pursuant to 28 U.S.C. § 2884 and 42 U.S.C. § 1973c.

3. Texas is a jurisdiction covered by section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. See 28 C.F.R. Part 51, App. (1993). Texas is the plaintiff in this action.

4. The United States of America is the national sovereign and has substantial responsibilities under section 5 of the Voting Rights Act. The United States of America is the defendant in this action.

NEW JUDGESHIPS AT ISSUE

5. Altogether, eight new state judgeships are the focus of this action, which seeks judicial preclearance of the following state legislation:

a. Ch. 1032, House Bill 171 (1993) (regular session), creating the 385th District Court for Midland County;

b. Ch. 653, House Bill 2821 (1993) (regular session), creating County Court at Law No. 3 for Fort Bend County;

c. Ch. 318, House Bill 2856 (1993) (regular session), creating County Criminal Court at Law No. 15 for Harris County;

d. Ch. 354, Senate Bill 1398 (1993) (regular session), replacing Tarrant County Criminal Court No. 5 with a Tarrant County Criminal Court of Appeals, limited to appellate jurisdiction paralleling the appellate jurisdiction of the replaced court and the other nine statutory county criminal courts in the county; and

e. Ch. 38, House Bill 101 (1987) (second called session), creating Tarrant County Criminal Courts Nos. 7-10.

DISTRICT COURT AND STATUTORY COUNTY COURTS

6. Both states district courts and state statutory county courts at law are at issue in this case. Their basic subject matter jurisdictions differ, and the legal underpinnings for the electoral system of selecting their judges are found in different places. The electoral system for both sets of courts -- district courts and statutory county courts at law -- in the counties where the courts involved in

this case would sit are basically the same. Furthermore, its essential elements remain unchanged by the newly created courts. Basically, the electoral system requires countywide, partisan elections employing a majority vote requirement for party primaries and a plurality vote requirement for the general election. The basic terms for both types of judges are four years, and the judicial eligibility requirements are the same.

District courts

7. District courts are the state's primary trial courts; they are courts of general jurisdiction. The requirement that district court positions be filled through countywide elections is constitutionally-based, specifically deriving from sections 7 and 7a(i) of article V of the Texas Constitution. Each of these two state constitutional sections received administrative preclearance under section 5 of the Act through a letter dated October 1, 1985. They have been finally adjudicated not to violate any federal constitutional prohibitions against racial or ethnic discrimination. A federal district court determined that the same system governing the election of district judges that now is in effect is not maintained on a tenuous basis as a pretext for discrimination and that the system is not instituted with the specific intent to dilute, minimize, or cancel the voting strength of black or Hispanic voters. See *League of United Latin American Citizens Council No. 4434 v. Mattox*, Civ. Action No. MO-88-CA-154, slip op. at 77 & 91-92 (W.D. Tex. Nov. 8, 1989) ("*LULAC*"). This constitutional aspect of *LULAC* went unappealed; therefore, it is binding upon this Court. See *LULAC*, 999 F.2d 831, 838 & n.3 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 878 (1994) ("district court [found] that plaintiffs had failed to prove that Texas instituted or maintained the [judicial] electoral system with discriminatory intent[,]" which went unappealed).

8. District court vacancies between elections are filled through gubernatorial appointment, subject to the advice and consent of the Texas Senate.

Statutory county courts at law

9. Statutory county courts at law are, as the name implies, creatures of the legislature. Their creation is permitted by section 1 of the article V of the Texas Constitution. The subject matter jurisdiction of these statutory county courts varies from

county to county based on the legislation creating them. Basically, though, these courts have civil jurisdiction over controversies involving smaller amounts of money and criminal jurisdiction over misdemeanors involving smaller monetary penalties and lesser periods of confinement. These courts also typically serve as *de novo* appellate courts from justice of the peace and municipal courts.

10. Section 30 of Article V of the Texas Constitution requires that the judges of all state courts of countywide jurisdiction be elected; however, the basis for electing the judges for statutory county courts at law through countywide elections does not derive from the state constitution, as does the basis for electing district judges countywide. Instead, the basis is statutory. Section 1.005(3) of the Texas Election Code defines a county office as an office of the county government that is voted on countywide. Section 52.092(e)(2)-(4) of the Texas Election Code directs the Texas Secretary of State to list a statutory county court at law contest as a county office on the official ballot. (Both of these Election Code sections received administrative preclearance through a DOJ letter of August 16, 1985, when the substantive recodification of the Texas Election Code was precleared.) Hence, the Election Code is read to require countywide elections for statutory county courts, including those at issue in this case.

11. Statutory county court at law vacancies between elections are filled through appointment by the county commissioners court of the county where the court sits.

SECTION 5 ADMINISTRATIVE PRECLEARANCE EFFORTS

12. The state, through its Secretary of State, has submitted each of the new and modified judgeships at issue in this case to the United States Department of Justice ("DOJ") for administrative preclearance under section 5 of the Act. As this lawsuit is filed, they are in varying postures in that regard.

13. DOJ denied preclearance to Ch. 1032, the new Midland County district court, through a letter of May 9, 1994. In the letter, DOJ indicated its view that the state had not satisfied its burden of establishing that the new judgeship was not created for the purpose of discriminating on the basis of race or ethnicity. Through a letter dated May 20, 1994, the state requested expedited

reconsideration of the administrative preclearance denial. DOJ has not yet acted on the pending reconsideration request.

14. DOJ denied preclearance to Ch. 318, the new Harris County county criminal court at law, and to Ch. 653, the new Fort Bend County county court at law, through a letter of May 31, 1994. In the letter, DOJ indicated its view that the state had not satisfied its burden of establishing that the new judgeship was not created for the purpose of discriminating on the basis of race or ethnicity. The state has taken no further action on these two judgeships in the administrative preclearance arena.

15. The state through inadvertence had failed to submit Ch. 38, the four new Tarrant County county criminal courts at law, for preclearance in 1987 near the time of the legislation's enactment. This oversight was called to the state's attention shortly after the new judgeships created in the 1993 regular session of the Texas Legislature were submitted for section 5 administrative preclearance, and Ch. 38 was submitted for preclearance at approximately four months after the new 1993 judgeships were submitted. In the meantime, these four Tarrant County judgeships had been filled through elections, and the judges elected to the posts have been hearing and disposing of cases. Also, DOJ already had precleared a new Tarrant County County Court at Law No. 3, created at the same time as the four Tarrant County county criminal courts at law in 1987.

16. Following the DOJ preclearance denials for the Midland County district court judgeship and the Harris and Fort Bend Counties statutory county courts, the state, through its Secretary of State in a letter of June 3, 1994, withdrew the administrative preclearance submissions for the four 1987 Tarrant County county criminal courts at law and for Ch. 354, the revamped Tarrant County county criminal court of appeals. DOJ had not acted on these two submissions by the time they were withdrawn, shortly before the deadline for DOJ action was to run. Texas through its Secretary of State recently has resubmitted these Tarrant County judgeships for administrative preclearance, while noting its view that the county criminal court of appeals is not within section 5's purview. DOJ has not yet acted on this resubmittal.

DISPOSITION OF RELEVANT LITIGATION

17. During the period in 1993 that the 73rd Texas Legislature had the new judgeships in Fort Bend County, Harris County, Midland County, and Tarrant County under consideration, the state was defending a high-profile lawsuit brought under the United States Constitution and section 2 of the Voting Rights Act. As discussed in ¶ 7, above, the federal district court already had disposed of the constitution-based intentional discrimination challenge in a decision that was not appealed by the *LULAC* plaintiffs. On August 23, 1993, shortly after the 73rd Texas Legislature's adjournment, and well before DOJ acted on the administrative preclearance submissions for the new 1993 judgeships plus the four 1987 ones, the en banc United States Court of Appeals for the Fifth Circuit had reversed the federal district court's finding of state liability on the claim brought under section 2 of the Act. In *LULAC*, 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 878 (1994), the 5th Circuit held that Texas's system for electing district judges in nine targeted Texas counties did not violate section 2. In particular, the 5th Circuit held that the system for electing district judges did not violate section 2: (i) in Harris County, *see* 999 F.2d at 880-85, taking into account analyses that included statutory county court elections; (ii) in Midland County, *see* 999 F.2d at 891-92; and (iii) in Tarrant County, *see* 999 F.2d at 885-87, taking into account analyses that included statutory county court elections. Fort Bend county had been targeted through most of the pretrial phase of the *LULAC* case, but the plaintiffs had dropped the county as a target when they amended their complaint shortly before the 1989 trial.

18. Earlier, while the *LULAC* litigation was proceeding through its first phase of appeals on the question of section 2 coverage, DOJ had tried to lodge an administrative preclearance objection to certain new Texas judgeships. In late 1990, DOJ's efforts were judicially rebuffed in *Mexican American Bar Association of Texas v. Texas*, 755 F.Supp. 735 (W.D. Tex. 1990) (3-judge court), *appeal dism'd*, 111 S.Ct. 2252 (1991) ("*MABA*"). During the course of that *MABA* litigation, DOJ on behalf of the United States had "interpos[ed] an administrative objection, that is based solely upon a ground definitively rejected as the law in the Fifth Circuit." 775 F.Supp. at 741. "During oral argument in the

[*MABA*] matter, the DOJ ... asserted that it does not consider itself bound by the *LULAC* decision, even as to electoral changes in the three states encompassing the Fifth Circuit." *Id.* Instead, DOJ sought in *MABA* "to assert its view by ignoring the law of the circuit." *Id.* DOJ was rebuked by the *MABA* district court, which directed that DOJ was bound by the 5th Circuit determination. *Id.* Similarly, in this case DOJ is attempting to ignore the *LULAC* federal district court's disposition of the intentional discrimination challenge to the system and the *LULAC* 5th Circuit's disposition of the section 2 vote dilution challenge, especially in Midland County, Harris County, and Tarrant County.

STATUS OF ELECTIONS AND NEW COURTS

19. The four judgeships created in the 1993 regular legislative session, as well as the four judgeships created in the 1987 second called legislative session, are up for election this year, with those elected scheduled to take office or begin their new four-year terms on January 1, 1995. The party primary elections already have been completed, and party nominees for those judgeships have been selected. The general elections for those judgeships is on November 8, 1994, with early voting by personal appearance beginning on October 19, 1994.

NON-DISCRIMINATORY NATURE OF NEW JUDGESHIPS

20. The statutes adding the eight new judgeships involved in this action (counting the 1987 Tarrant County judgeships) to the preexisting and precleared electoral system do not have as their purpose, either partially or primarily, the denial or abridgement of the right to vote on account of race or color. Furthermore, neither as a whole nor in any part do these statutes have the effect of denying or abridging the right to vote on account of race or color nor do they have the effect of providing minority voters less opportunity than other members of the electorate to participate in the political process and to elect judicial candidates of their choice.

21. Additionally, Ch. 354, creating the County Court of Criminal Appeals of Tarrant County, is beyond the purview of section 5 of the Act. It is nothing more than a rearrangement of preexisting jurisdictional powers, not falling within the range of changes covered by section 5.

22. A main purpose of the statutes creating the new judgeships whose preclearance is sought through this action is to enhance the efficient operation of the Texas judicial system in the affected counties through relieving the overcrowded dockets of the existing courts in those counties. Indicative of the need for such courts, as of August 31, 1993, the last date for which statistics have been compiled, the total cases pending in the affected counties for the type of court being created were: (i) district courts in Midland County, 3,287 cases; (ii) county courts in Fort Bend County, 3,992 cases; (iii) county courts in Harris County, 47,828 cases; and (iv) county courts in Tarrant County, 47,359 cases. (The county court totals include statutory county courts plus the single constitutional county court present in each county.)

23. Adding the new judgeships to the preexisting judicial system, including the governing judicial electoral system, in the affected counties would not affect minority voting power, which would have the same effectiveness countywide both before and after the additional judgeships. Specifically, adding the new judgeships whose preclearance is sought in this case would have the following effects (counting all statutory county courts in a given county, including probate courts, civil county courts at law, criminal county courts at law, and criminal appeals county courts at law):

a. increasing Midland County district courts from three to four;

b. increasing Fort Bend County statutory county courts from two to three;

c. increasing Harris County statutory county courts from twenty-two to twenty-three; and

d. increasing Tarrant County statutory county from eleven to fifteen.

REQUEST FOR RELIEF

24. WHEREFORE, the plaintiff prays that this Court:

a. Assert jurisdiction in this matter and request the convening of a three-judge Court;

b. Issue a declaratory judgment under section 5 of the Voting Rights Act preclearing each of the following:

(1) Ch. 1032, House Bill 171 (1993) (regular session), creating the 385th District Court for Midland County;

(2) Ch. 653, House Bill 2821 (1993) (regular session), creating County Court at Law No. 3 for Fort Bend County;

(3) Ch. 318, House Bill 2856 (1993) (regular session), creating County Criminal Court at Law No. 15 for Harris County;

(4) Ch. 354, Senate Bill 1398 (1993) (regular session), replacing one of ten Tarrant County statutory criminal courts with a Criminal Court of Appeals of Tarrant County; and

(5) Ch. 38, House Bill 101 (1987) (second called session), creating County Criminal Court Nos. 7-10 for Tarrant County (including a declaration of the voting rights validity of the courts' operation and actions at all times prior to issuance of the declaration);

c. As an alternative insofar as the Criminal Court of Appeals of Tarrant County is concerned, declaring that it is not subject to preclearance under section 5; and

d. Grant such other and further relief as is deemed just and proper.

Respectfully submitted,

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ATTORNEYS FOR STATE OF TEXAS

UNITED STATES STATUTES

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, provides in pertinent part:

§ 1973c: Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the . . . third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a decl ratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure . . . .

STATE STATUTES

Ch. 653, House Bill 2821 (1993) (regular session):
SECTION 1. Section 25.0811, Government Code, is amended to read as follows:
Sec. 25.0811. FORT BEND COUNTY. Fort Bend County has the following statutory county courts:

. . . .

(3) County Court at Law No. 3 of Fort Bend County.

SECTION 2. Notwithstanding Section 25.0811, Government Code, as amended by this Act, the County Court at Law No. 3 of Fort Bend County is created January 1, 1995.

Ch. 318, House Bill 2856 (1993) (regular session):
SECTION 1. Section 25.1031(b), Government Code, is amended to read as follows:
(b) Harris County has the following county criminal courts:

. . . .

(15) County Criminal Court at Law No. 15 of Harris County, Texas.

SECTION 2. Notwithstanding Section 25.1031(b)(15), Government Code, as added by this Act, the County Criminal Court at Law No. 15 of Harris County, Texas, is created January 1, 1995.

Ch. 38, House Bill 101 (1987) (second called session):
SECTION 1. Section 25.2221(b), Government Code, as added by Chapter 148, Acts of the 70th Legislature, Regular Session, 1987, is amended to read as follows:

(b) Tarrant County has the following county criminal courts:

. . . .

(7) County Criminal Court No. 7 of Tarrant County;

(8) County Criminal Court No. 8 of Tarrant County;

(9) County Criminal Court No. 9 of Tarrant County; and

(10) County Criminal Court No. 10 of Tarrant County.

SECTION 2. Sections 25.2223(a) and (e), Government Code, as added by Chapter 148, Acts of the 70th Legislature, Regular Session 1987, are amended to read as follows:

(a) A county criminal court in Tarrant County has jurisdiction over all criminal matters and causes, original and appellate, prescribed by law for county courts, but does not have civil jurisdiction. The County Criminal Courts Nos. 3, 4, 5, and 6 of Tarrant County also have concurrent jurisdiction within the county of all appeals from criminal convictions under the laws of this state and the municipal ordinances of the municipalities located in Tarrant County that are appealed from the justice courts and municipal courts in the county. *The County Criminal Courts Nos. 7, 8, 9, and 10 of Tarrant County also have concurrent jurisdiction with the district court in felony cases to conduct arraignments, conduct pretrial hearings, and accept guilty pleas.*

. . . .

SECTION 6. This Act takes effect September 1, 1987.

. . . .

(2)

No. 94-1105

FEB 22 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the United States District Court for the District of Columbia correctly issued a preliminary injunction preventing the State of Texas from holding elections for newly-created judgeships which had not been precleared pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1105

STATE OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the district court was entered on September 27, 1994. A notice of appeal (J.S. App.

4a-5a) was filed on October 13, 1994, and the appeal was docketed on December 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATEMENT

This case involves an attempt by the State of Texas to hold elections for several newly-created judgeships prior to obtaining preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The State challenges the district court's decision to enjoin those elections.

1. On July 14, 1994, the State of Texas instituted this declaratory judgment action in the United States District Court for the District of Columbia to obtain preclearance under Section 5 for the voting changes in statutes creating new judgeships enacted in 1993 and 1987. (1) Chapter 1032 (1993), which creates the new 385th District Court for Midland County; (2) Chapter 653 (1993), which creates the new County Court at Law No. 3 for Fort Bend County; (3) Chapter 318 (1993), which creates the new County Criminal Court at Law No. 15 for Harris County; and (4) Chapter 38 (1987), which creates four new County Criminal Courts at Law, Nos. 7-10, in Tarrant County. J.S. App. 6a-7a.[1] Judges for those courts were to be elected at large in their respective jurisdictions, for numbered positions, in

[1] The complaint also sought judicial preclearance for the voting changes in Chapter 354 (1993), which replaced Tarrant County Criminal Court No. 5 with a new Tarrant County Criminal Court of Appeals. However, the Attorney General administratively precleared this enactment on August 15, 1994, the same day that the United States filed its answer. See Answer, Exh. E.

partisan elections. Party nominees were to be selected at primaries with majority vote requirements. *Id.* at 8a. At the time the State brought this preclearance action, the three judgeships created by the 1993 statutes had not yet been filled. However, judges were already serving in the four courts created by the 1987 statute. *Id.* at 10a.

Prior to the institution of this action, the State had submitted the voting changes in the three 1993 statutes to the Attorney General for administrative preclearance. J.S. App. 9a-10a. The Attorney General interposed timely objections to each of the proposed changes.[2] The State had also sought administrative preclearance for the voting changes occasioned by the 1987 statute prior to filing the suit but withdrew the administrative submission before the Attorney General made a merits determination.[3] J.S. App. 10a. The State resubmitted those changes the day it instituted this suit, and the Attorney General subsequently interposed a timely objection to them. Answer, Exh. E.

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[2] The Attorney General objected to Chapter 1032 on May 9, 1994, and denied the State's request for reconsideration on July 25, 1994. See Complaint ¶ 13 (J.S. App. 9a-10a); Answer ¶ 13. The Attorney General objected to Chapters 318 and 653 on May 31, 1994. See Complaint ¶ 14 (J.S. App. 10a); Answer ¶ 14.

[3] Texas held elections for the four Tarrant County judgeships, created in 1987, before submitting the change for preclearance. The Attorney General informed the State in October of 1993—more than a year before the 1994 elections—that the changes effected by the creation of those judgeships had not yet been precleared. Letter from Steven H. Rosenbaum to the Hon. John Hannah, Jr., at 1 (Oct. 25, 1993), *reprinted in* Answer, Exh. E.

2. The State has been on notice that implementation of the voting changes occasioned by creation of the judgeships is unlawful "unless and until" they receive administrative or judicial preclearance. 42 U.S.C. 1973c. On several occasions, Texas has assured the courts and the Attorney General that it had no intention of implementing the changes pending preclearance. However, on each occasion the State later sought to implement the unprecleared changes despite its previous assurances.

In 1993, private plaintiffs sued to block the implementation of the Midland County district judgeship created by Chapter 1032 in 1993 pending preclearance. See *Hernandez* v. *Texas*, No. MO-93-CA-178 (W.D. Tex.). The district court dismissed that suit as premature after the State assured the court that it had "no intention to implement the change of creating a new District Court through [Chapter 1032] until such time as preclearance is obtained." Defendant's Motion to Dismiss With Supporting Brief and Original Answer at 1-2, *Hernandez* v. *Texas*, No. MO-93-CA-178 (W.D. Tex.), reprinted as Attachment B to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction.

Despite this assurance, the State sought to implement all the unprecleared judgeships, including the Midland County judgeship, at the March 8, 1994, primary election. Four days before the primary, the Chief of the Voting Section of the Civil Rights Division sent a letter to the Texas Attorney General and Secretary of State reminding them that the State "would violate Section 5 by implementing the * * * changes in the upcoming election." Letter from

Steven H. Rosenbaum to the Hon. John Hannah, Jr., and the Hon. Dan Morales at 2 (Mar. 4, 1994), *reprinted in* Answer, Exh. F. On March 8, the day of the primary election, the Chief of the Voting Section sent via telefacsimile a letter to the Texas Secretary of State reiterating that, under established Section 5 law, "voting changes such as the ones at issue are 'implemented' with the commencement of any part of the election process, including candidate qualification and nomination through primary elections." Letter from Steven H. Rosenbaum to the Hon. John Hannah, Jr. at 1 (Mar. 8, 1994), *reprinted in* Answer, Exh. G.

Despite those warnings, the State proceeded with the primary election on March 8. Two days after the primary, the State assured the Attorney General that it would not engage in any further implementation of the unprecleared judgeships:

> Please be assured that our office intends to comply with Section 5's prohibition on the implementation of the unprecleared voting changes referred to in your letter. Neither the State of Texas nor the county chairs in the affected counties will certify any of the judgeships set forth in Chapters 38, * * *, 318, 653, and 1032 for the November 1994 general election ballot until they are precleared.

Letter from John Hannah, Jr., to Steven H. Rosenbaum at 1 (Mar. 10, 1994), *reprinted in* Answer, Exh. G.

Following the Attorney General's objection to Chapter 1032, which created the new Midland County district judgeship, the private plaintiffs on June 3, 1994, reinstituted their suit for injunctive relief

against the implementation of that provision. In its answer, the State admitted that it had "implemented the electoral aspects of Chapter 1032." Answer ¶ 9, *Hernandez* v. *Texas*, No. MO-94-CA-110 (W.D. Tex.), reprinted as Attachment C to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction. On August 22, 1994, after the State had initiated its declaratory judgment action in the District Court for the District of Columbia, an agreed final judgment was entered in the *Hernandez* litigation (to which the United States was not a party). The judgment authorized the State to proceed with the general election for the new Midland County judgeship "regardless of the preclearance status under section 5 of the Voting Rights Act of the legislation creating that office." *Hernandez* v. *Texas*, No. MO-94-CA-110 (W.D. Tex. Aug. 22, 1994), slip op. 1 (three-judge court), reprinted as Attachment A to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction. However, it prohibited the State from certifying the winner until Chapter 1032 received preclearance. *Id.* at 2.

3. After the entry of the *Hernandez* judgment, the Texas Secretary of State abandoned his earlier assurance that the unprecleared judgeships would not be certified for the November general election. During proceedings on the declaratory judgment action on August 23, 1994, counsel for the State announced that the Secretary of State intended to certify candidates for *all* of the unprecleared judgeships at issue in the declaratory judgment action—not simply the single Midland County district judgeship at issue in

Hernandez. 8/23/94 Tr. 20-21. Counsel for the United States responded by sending a letter by telefacsimile to the attorney representing the State. The letter requested that the State reaffirm the position the Secretary of State had set forth in his March 10 letter—that Texas would not certify candidates for any of the positions at issue unless and until it obtained preclearance for the creation of those positions. Letter from Robert A. Kengle to Renea Hicks, Esq. (Sept. 7, 1994), reprinted as Attachment E to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction. In a letter dated September 14, 1994, counsel for the State responded that "[t]he state's position now on ballot certification is the same as that stated in open court at the status conference before Judge Jackson on August [23d]." Letter from Renea Hicks to Robert A. Kengle (Sept. 14, 1994), reprinted as Attachment D to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction.

Because Texas was about to commence printing ballots for the November election, the United States sought a temporary restraining order and preliminary injunction in the declaratory judgment action pending in the District Court for the District of Columbia. The application, filed on September 14, 1994, requested "an order a) enjoining the State of Texas and its agents, including the responsible county election officials, from taking any steps to certify the names of the candidates nominated in the March 8, 1994 primary election for the November 8, 1994 general election; b) requiring the State of Texas and its

agents, including the responsible county election officials, to withdraw any certification of candidates it has made as a result of the March 8, 1994 primary elections for the seats at issue in this litigation; and c) directing the state to seek dissolution of the *Hernandez* injunction." United States' Application for Temporary Restraining Order and Preliminary Injunction at 2-3.

The following day, a single judge issued a temporary restraining order. On September 27, 1994, the three-judge court held a hearing on the application for a preliminary injunction; it issued its ruling later that same day. J.S. App. 1a-3a. The court granted the application to enjoin the elections for the Fort Bend County, Harris County, and Tarrant County judgeships. J.S. App. 3a. Because the State sought to conduct elections for those judgeships prior to obtaining preclearance, the court concluded that "an injunction to stop the elections [was] mandatory" under this Court's decision in *Clark* v. *Roemer*, 500 U.S. 646 (1991). J.S. App. 2a.[4] However, in deference to the ruling of the three-judge court in *Hernandez*, the court refused to enjoin the election for the Midland County district judgeship or to order the State to seek a dissolution of the *Hernandez* judgment. J.S. App. 2a-3a. The State has appealed the injunction against the Fort Bend County, Harris County, and Tarrant County elections. J.S. App. 4a. The United States did not cross-appeal from the de-

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[4] The United States' motion for a preliminary injunction sought only to enjoin the 1994 election; it did not affect the status of the judges already sitting in Tarrant County. Accordingly, the latter issue is not before the Court. J.S. App. 1a.

nial of relief with respect to the Midland County election.

ARGUMENT

The district court correctly issued an injunction preventing Texas from holding elections for the unprecleared judgeships at issue in this case. This case, which is essentially controlled by *Clark* v. *Roemer*, 500 U.S. 646, 659 (1991), does not present any substantial unresolved issue of law. Accordingly, the Court should summarily affirm the judgment of the district court.[5]

1. Section 5 of the Voting Rights Act of 1965 prohibits certain jurisdictions—including Texas—from implementing changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c. Where, as here, the Attorney General has interposed an objection to

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[5] We agree with the appellant (J.S. 12) that this case is not moot. By its terms, the injunction affected only the November 8, 1994, general election. However, should Texas attempt to hold elections for the unprecleared judgeships at a later date, "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints." *Norman* v. *Reed*, 112 S. Ct. 698, 705 (1992). Because the issues presented by this case are "capable of repetition, yet evading review," the district court's "short term order[]" should not defeat their consideration. *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). See *Democratic Party* v. *Wisconsin ex rel. LaFollette*, 450 U.S. 107, 115 n.13 (1981) ("[E]ven if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.'"); *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974).

the proposed electoral change, the jurisdiction may not implement the change in any way "unless and until" the District Court for the District of Columbia issues a declaratory judgment "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Ibid.* The District Court for the District of Columbia has exclusive jurisdiction to render the necessary declaratory judgment; no other court may consider the substantive question whether the electoral change is entitled to preclearance. See 42 U.S.C. 1973*l*(b); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-335 (1966).

Because changes may not be enforced until a covered jurisdiction "has succeeded" in obtaining preclearance, *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977), this Court has held that, at least absent "extreme circumstance[s]," an election for a newly-created position must be enjoined pending a preclearance determination. *Clark* v. *Roemer*, 500 U.S. 646, 654-655 (1991). In enforcing this clear mandate, the District Court for the District of Columbia has consistently granted motions filed by the United States to enjoin elections pending the adjudication of declaratory judgment actions brought by covered jurisdictions. See, *e.g.*, *Lee County, Mississippi* v. *United States*, No. 93-708 (D.D.C. Apr. 26, 1994) (three-judge court); *South Carolina* v. *United States*, 585 F. Supp. 418, 422-425 (D.D.C.) (three-judge court), appeal dismissed, 469 U.S. 875 (1984); *Busbee* v. *Smith*, No. 82-0665 (D.D.C. May 24, 1982) (three-judge court); *Horry County* v. *United States*, 449 F. Supp. 990, 996-997 (D.D.C. 1978) (three-

judge court). Although the full Court has never been presented with challenges to the validity of such injunctions, both then-Chief Justice Burger and then-Justice Rehnquist refused to stay the three-judge court's injunction in *Busbee* v. *Smith*, *supra*. See *Busbee* v. *Smith*, 549 F. Supp. 494, 497 n.1 (D.D.C. 1982) (three-judge court), summarily aff'd, 459 U.S. 1166 (1983).

The District Court for the District of Columbia's practice of enjoining the implementation of electoral changes pending its resolution of judicial preclearance actions is well grounded in the Voting Rights Act. The court's jurisdiction to enter these injunctions stems from two independent sources. First, Section 12 of the Act, 42 U.S.C. 1973j, affords explicit statutory authority.[6] Section 12 authorizes the Attorney General to seek injunctive relief against state actions violative of Section 5, see 42 U.S.C. 1973j(d), and provides that "[t]he district courts of the United States shall have jurisdiction" over such proceedings. 42 U.S.C. 1973j(f). See also *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 554-557 (1969) (private party may sue to enjoin enforcement of state electoral measure that has not received preclearance required

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[6] Citing *South Carolina* v. *United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (three-judge court), Texas argues (J.S. 9) that the District Court for the District of Columbia has rested its injunctive jurisdiction on Section 14(b) of the Act, which grants that court exclusive jurisdiction "to issue any declaratory judgment" under Section 5. It is clear from the *South Carolina* opinion, however, that the court's citation of Section 14(b) was intended to refer only to the basis for its jurisdiction over the ultimate preclearance determination, not its jurisdiction to issue an injunction. See 589 F. Supp. at 759.

by Section 5). Unlike Sections 5 and 14 of the Act, which provide that only the District Court for the District of Columbia may make the *substantive* determination whether a change is entitled to preclearance, Section 12 contains no geographical limitation. It therefore grants all "district courts of the United States"—including the District Court for the District of Columbia—subject matter jurisdiction to enjoin the implementation of voting changes pending preclearance.[7]

In addition to the authority conferred by Section 12, the District Court for the District of Columbia has jurisdiction to enjoin an election under the established power of courts to issue orders "necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. 1651(a). Pursuant to that authority, a district court has jurisdiction to maintain the status quo during the pendency of an action where the failure to do so would impair its ultimate ability to afford effective relief. See *FTC* v. *Dean Foods Co.*,

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[7] This is not to say that the District Court for the District of Columbia will always be a proper forum for an injunction against the unlawful implementation of an electoral change. There may, for instance, be cases in which that court lacks jurisdiction over the parties who seek to implement the unprecleared change. Cf. *Charlton County Bd. of Educ.* v. *United States*, 459 F. Supp. 530, 533-535 (D.D.C. 1978). Such cases would be most likely to arise where the covered jurisdiction has not filed an action for judicial preclearance. Here, however, Texas consented to the *in personam* jurisdiction of the District Court for the District of Columbia by filing its complaint for declaratory judgment in that court. In any event, appellant does not contend that the district court lacked jurisdiction *over the parties*; rather, it asserts that the court lacked jurisdiction *over the subject matter*. See J.S. i (first question presented).

384 U.S. 597, 605 (1966); see also *Morrow* v. *District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969) ("[A]ncillary orders will issue when a party's actions, either directly or indirectly, threaten to compromise the effective[ness] of the court's judgment."). If the elections for the unprecleared judgeships had gone forward, the district court would have been significantly compromised in its ability to make a meaningful determination in the State's declaratory judgment action. See *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) ("Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election."). Under such circumstances, an injunction was necessary in aid of the three-judge court's jurisdiction to adjudicate the declaratory judgment action.

Without addressing those well-established bases for jurisdiction, the State claims that the district court had no power to enjoin the elections pending its preclearance determination. It appears to assert that Section 5 actually *prohibits* the District Court for the District of Columbia from enjoining the implementation of unprecleared changes. In the State's view, the United States must institute a separate action in a local district court if it desires an injunction against the illegal implementation of an electoral change, even if the District Court for the District of Columbia is already considering—at the instance of the covered jurisdiction—whether the change is entitled to preclearance. J.S. 8-10.

The State identifies no provision of the Voting Rights Act that requires such a wasteful duplication

of resources. Nor can such a requirement fairly be inferred from this Court's precedents. It is true, as the State notes, that "Congress intended to treat 'coverage' questions differently from 'substantive discrimination' questions." *Allen* v. *State Bd. of Elections*, 393 U.S. at 559. Specifically, Congress reserved to the District Court for the District of Columbia the "difficult substantive issue" of whether a change has a discriminatory purpose or effect, *id.* at 558, while granting jurisdiction to "[t]he district courts of the United States"—without geographic limitation—to enjoin the implementation of covered enactments that have not been precleared. 42 U.S.C. 1973j(f). Congress's intent was clear: to ensure that an expert tribunal would decide the difficult and sensitive matter of whether a state enactment is discriminatory, while allowing individual litigants—who "will often not have sufficient resources to maintain an action easily outside the district"—to obtain injunctions in local district courts against the enforcement of unlawful election practices. *Allen*, 393 U.S. at 559-560. While the "substantive" determination is restricted to a particular court, the "coverage" determination is not.

No case cited by the State—and no case ever decided by this Court—suggests that a local district court is the *only* permissible forum for enjoining covered changes pending preclearance.[8] This Court held

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[8] Relying on *Clark* v. *Roemer*, 500 U.S. at 659-660, the State argues (J.S. 10) that local district courts are in a better position than the District Court for the District of Columbia to decide whether to enjoin the enforcement of unprecleared changes. The cited portion of *Clark* did not involve a choice between a local district court and the District Court for the

in *Allen* that local district courts have jurisdiction to enforce Section 5's prohibition on the implementation of unprecleared voting changes, not that the District Court for the District of Columbia is barred from doing so. See *Allen*, 393 U.S. at 560 ("We hold that the restriction of § 14(b) does not apply to suits brought by private litigants seeking a declaratory judgment that a new state enactment is subject to the approval requirements of § 5, and that these actions may be brought in the local district court."). The district court thus had subject matter jurisdiction to issue the preliminary injunction.

2. The State contends (J.S. 10) that the district court was required to "perform the traditional equitable balancing" before enjoining the election. In particular, the State argues that the district court should have considered whether the State was likely to succeed on the merits of its declaratory judgment action. *Id.* at 11. The State's argument is directly contrary to this Court's decision in *Clark*, and it would subvert the remedial scheme established by Congress in Section 5.

Congress enacted the Voting Rights Act because nearly a century of experience with the Fifteenth

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District of Columbia. Rather, it involved the question of whether the district court or *this Court* was in a better position to fashion a remedial decree. Moreover, the cited portion of *Clark* did not (as the State asserts, see J.S. 10) address a setting "identical to the one giving rise to this appeal." The portion of *Clark* on which the State relies involved the question of what remedy to impose for the elections that the district court had erroneously failed to enjoin. As this Court recognized in *Clark*, entirely different considerations come into play in addressing "the *ex ante* question whether to allow illegal elections to be held at all." 500 U.S. at 654.

Amendment had shown that in some areas of the country, voting rights could not be effectively protected by traditional litigation. "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *South Carolina* v. *Katzenbach*, 383 U.S. at 328. Thus, in an admittedly "uncommon exercise" of its power, *id.* at 334, Congress decided "to shift the advantage of time and inertia from the perpetrators of evil to its victims." *Id.* at 328. That strategy was most clearly reflected in Section 5 which, "without any need for prior adjudication," prevents jurisdictions covered by the Act from enforcing *any* voting change until preclearance has occurred. 383 U.S. at 328. Under that Section, the burden is on the covered jurisdiction to obtain an adjudication that the change lacks discriminatory purpose and effect; voting changes "are not now and will not be effective as laws until and unless cleared." *Connor* v. *Waller*, 421 U.S. 656, 656 (1975) (per curiam).

The State's position would set this carefully crafted scheme on its head. By requiring that a party seeking to enjoin the enforcement of an unprecleared voting change must demonstrate that the covered jurisdiction is unlikely to succeed on the merits of its declaratory judgment action (demonstrate, that is, that the court would likely conclude that the change had a discriminatory purpose or effect), the State's position would reintroduce the "prior adjudication" requirement Congress eschewed in enacting Section 5. In contradiction to this Court's precedents, it would "place the advantages of time and

inertia back on the perpetrators of the discrimination." *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S. 110, 125 (1978). This Court has therefore repeatedly held that a court considering an application to enjoin the enforcement of an unprecleared voting change may not consider the substantive question whether the change had a discriminatory purpose or effect. Rather, a court may consider only whether the change is subject to Section 5 and whether it has been precleared. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983); *Perkins* v. *Matthews*, 400 U.S. 379, 383-386 (1971). The District Court for the District of Columbia has followed this practice. In preliminarily enjoining unprecleared changes, it has correctly refused to consider whether the jurisdictions involved are likely to prevail on the merits of their declaratory judgment actions. See *South Carolina* v. *United States*, 585 F. Supp. at 422-423 n.8.

As the district court in this case recognized, this Court's decision in *Clark* v. *Roemer*, *supra*, is "dispositive" of the State's claim. J.S. App. 1a. There, as here, a State sought to hold elections for newly-created judgeships without obtaining preclearance. Without considering whether the State was likely to succeed in obtaining preclearance for these judgeships, this Court held that, at least absent "extreme circumstance[s]," district courts are "required" to enjoin elections for unprecleared positions. *Clark*, 500 U.S. at 654.[9] Although the Court suggested that

[9] The State suggests that an election for an unprecleared position does not constitute "implementation" of the statute

"[a]n extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed," *id.* at 654-655, this case does not present any such circumstance. The State was on notice of the unprecleared status of the judgeships more than a year before the election, and the Attorney General interposed timely objections. See *id.* at 654. Moreover, "equitable principles" weigh against the State. As detailed above, the State's behavior in this matter has been marked by a cycle of assurances that it had no intention of implementing the unprecleared changes, followed by the implementation of those changes, followed by assurances that it would not implement them any further. The State's attempts to evade the preclearance requirement strongly support the district court's decision to enjoin the elections.

The State relies (see J.S. 11) on *Clark*'s direction to the district court to "adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practica[l] manner and with least offense to its provisions." 500 U.S. at 660. That directive, however, refers to the framing of an appropriate remedy for elections that had already been held in violation of Section 5. Under such circumstances, the district court must take account of equitable principles in formulating its decree.

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creating that position. See J.S. 11 n.7. However, *Clark* makes clear that the holding of the election—and not merely the swearing in of the victorious candidate—constitutes "implementation" which must be enjoined pending preclearance. 500 U.S. at 652-655.

But "[h]ere the District Court did not face the *ex post* question whether to set aside illegal elections; rather, it faced the *ex ante* question whether to allow illegal elections to be held at all. On these premises, § 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election." *Id.* at 654.[10] The district court followed this dictate in issuing its injunction.

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[10] The State also relies (see J.S. 11) on the fact that Justice Kennedy, acting as Circuit Justice, weighed equitable factors in deciding whether to enjoin the election in *Lucas* v. *Townsend*, *supra*. That case, however, involved the question whether the contested referendum effected a "change" in voting practices covered by Section 5. See 486 U.S. at 1304. Nothing in Justice Kennedy's opinion calls into question the principle that an electoral practice that is acknowledged to effect such a "change" should be enjoined pending preclearance. Indeed, Justice Kennedy observed that "[p]ermitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect," and that, "[e]ven if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive." *Id.* at 1305.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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FEBRUARY 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20043